

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
(BROOKLYN)**

**IN RE: EXACTECH POLYETHYLENE
ORTHOPEDIC PRODUCTS LIABILITY
LITIGATION**

Case No.: 1:22-md-03044-NGG-MMH

**District Judge Nicholas G. Garaufis
Magistrate Judge Marcia M. Henry**

This Document Relates to All Cases

MDL No. 3044

JOINT STATUS REPORT

Pursuant to the Court’s Minute Entry & Order dated October 12, 2023 (Dkt. 454), and in anticipation of the December 20, 2023 Status Conference before the Honorable Nicholas G. Garaufis and Marcia M. Henry, Plaintiffs’ Co-Lead Counsel for the Plaintiffs (“Plaintiffs”), Exactech, Inc. and Exactech U.S., Inc. (collectively, “Exactech”), and the TPG Defendants (collectively, the “Parties”) jointly submit the following report regarding the status of discovery and the litigation generally.

I. Current Federal and State Court Case Count & State Court Coordination

There are currently 1,151 cases pending in or being transferred to this multidistrict litigation (“MDL”), 951 of which involve knee products, 191 of which involve hip products, and 9 of which involve ankle products. There are 368 state court cases pending in the Florida consolidated proceedings in the Eighth Judicial Circuit of Florida, Alachua County (“Florida MCL”), 268 of which involve knee products, 94 of which involve hip products, and 6 of which involve ankle products. There are 17 cases pending in state court in Illinois which are the subject of a pending motion for coordination. The Parties have identified an additional 24 cases pending

in other state courts.¹ The Parties continue to believe that discovery across federal and state court actions should be coordinated to the extent feasible and will continue to seek the assistance of the Court in accomplishing that goal.

II. Bellwether Plan

A. MDL

Pursuant to the Court’s Minute Entry & Order dated October 12, 2023 (Dkt. 454), on November 7, 2023, Plaintiffs and Exactech filed the Amended Case Management Order for Bellwether Trial Selection Process in Florida (the “Florida Bellwether Plan”) and the Parties’ Proposed Joint Case Management Order for Bellwether Trial Selection Process in the MDL (the “MDL Bellwether Plan”) with the Court. (Dkt. 475). Although the Court has not yet entered the MDL Bellwether Plan, the Parties have exchanged lists of cases that are eligible to be included in the two initial bellwether pools in the MDL and are close to agreement on the same. The Parties will be prepared to discuss the MDL Bellwether Plan at the December 20, 2023 Status Conference. The dates in the Proposed Joint Case Management Order for Bellwether Trial Selection Process in the MDL may need to be modified.

B. Florida

On October 26, 2023, Judge Keim granted the Florida Bellwether Plan. Over the last month, the Parties in the Florida litigation have agreed on the cases placed in the initial bellwether pool and exchanged their bellwether picks in Florida. Exercise of strikes will occur on December 15, 2023. The deadline for the Parties in the Florida litigation to submit their briefs for the final Florida bellwether selection is December 29, 2023. *See* (Dkt. 475-1, at p. 3).

¹ A list of all state court cases other than the cases pending in Florida and Illinois is attached as Exhibit A.

III. Discovery from Exactech

A. Current Issues Pending

The TPG Defendants Motion to Dismiss Plaintiffs' Amended Master Personal Injury Complaint is fully briefed. (Dkts. 176, 376, 382, 387).

Pursuant to the Court's Minute Entry & Order dated October 12, 2023 (Dkt. 454), Exactech filed its two-page letter regarding its proposed TAR 2.0 protocol on October 16, 2023. (Dkt. 458). Plaintiffs' position is outlined in the October 5, 2023 Joint Status Report. (Dkt. 447 at pp. 9-13).

Plaintiffs filed a discovery dispute letter dated September 27, 2023 (Dkt. 434), seeking an order overruling Exactech's objections to three categories of requested information (1) foreign regulatory, (2) other similar litigation, and (3) Exactech-TPG merger due diligence documents. Exactech filed a response in opposition on October 4, 2023 (Dkt. 447).

Exactech filed a Motion for Reconsideration on October 26 solely to remove the "inappropriately withheld" comment in the Court's October 12 Minute Entry & Order (Dkt. 470).

B. Document Production Status

On October 19, 2023, Exactech produced approximately 100 redacted GDPR documents and the remaining non-privileged documents from the 123,321 set of documents that hit on Plaintiffs' revised search terms, as required by the Court's October 12 Minute Entry & Order. (Dkt. 454). On October 26, 2023, Exactech produced 32,073 pages of ESI to Plaintiffs. On November 20, 2023, Exactech produced 851,580 pages of ESI to Plaintiffs. On November 21, 2023, Exactech produced 198,744 pages of ESI to Plaintiffs. Since the October 12, 2023 Status Conference, Exactech has produced approximately 1,251,857 pages of ESI to Plaintiffs.

C. New Requests

On November 30, Plaintiffs served their Second Set of Interrogatories and Third Requests for Production on Exactech. In total, Plaintiffs have served 143 Requests for Production (including several subparts) and 31 Interrogatories (including several subparts) on Exactech to date.

D. Custodians

The Parties have been negotiating custodians for several months. Exactech has offered to collect ESI for 25 custodians, 24 of which have been accepted by Plaintiffs. The Parties continue to meet and confer in an attempt to resolve remaining issues.

E. Third Party Discovery

Plaintiffs and Exactech have both served non-party subpoenas upon various parties involved in the manufacture and supply of the medical devices and packaging at issue.

F. State Court Discovery Update

Exactech's Motion for Order to Disregard the Discovery Referee's [Recommended] Ruling on Plaintiff's motion to compel is pending in the *Collum-Bradford* case in state court in California.

Plaintiffs in more than a dozen Cook County, Illinois cases have also served requests for production and interrogatories on the Exactech Defendants. These requests are largely duplicative of discovery requests served in this MDL, Florida, and California. MDL Plaintiffs are not privy to the positions being taken by the Illinois Plaintiffs and Defendant's representations are being made unilaterally.

IV. Plaintiffs' Common Benefit Order

Plaintiffs Co-Lead Counsel have been discussing with the Florida leadership a common benefit order for shared costs and for the work done by leadership in the coordinated litigations and will be submitting a proposed order shortly.

V. The TPG Defendants

A. Motion To Dismiss

TPG Defendants served Plaintiffs with their motion to dismiss Plaintiffs' veil piercing and successor liability claims on June 9, 2023. Plaintiffs served their opposition on July 14, 2023. TPG Defendants filed their reply and all other briefing with the Court on July 28, 2023. Plaintiffs moved for leave to file a sur-reply on August 3, 2023. TPG Defendants opposed on August 8, 2023. TPG Defendants' motion is fully briefed.

B. Discovery

Magistrate Judge Henry granted TPG Defendants' motion to stay discovery on May 30, 2023 pending resolution of TPG Defendants' motion to dismiss.

The Parties look forward to seeing Your Honors at the Status Conference scheduled for December 20, 2023.

Dated: December 11, 2023

Respectfully submitted,

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